CAMPBELL CHEONG CHAN (M) SDN BHD *a*

v.

AYYAWOO NADESON

HIGH COURT MALAYA, KUALA LUMPUR *b*
NIK HASHIM J
[ORIGINATING MOTION NO: R3-25-68-98]
30 DECEMBER 1998

ADMINISTRATIVE LAW: *Remedies - Certiorari, application for - To quash Industrial Court's award - Whether finding of demotion by Industrial Court correct - Failure of Industrial Court to make specific finding of breach of contract - Whether rendered award erroneous in law - Usage of phrases "justifiable to request" and "judged reasonably and sensibly" - Whether amounted to application of "unreasonable test" - Whether "contract test" preferred - Whether there was a fundamental breach of contract by applicant company - Whether a case of loss of pride* *c* *d*

LABOUR LAW: *Employment - Constructive dismissal - Whether the "unreasonable test" or the "contract test" applicable*

This was an application by the applicant company for *certiorari* to quash the Industrial Court's award which held that the respondent was constructively dismissed and that such dismissal was without just cause and excuse. The Industrial Court had awarded the respondent backwages and compensation. *e*

The respondent was first appointed as financial controller but was later designated as an accounting manager wherein he was moved out from his room to the general office area and his Volvo 740 car was replaced with a 2.0 litre car. The respondent considered himself constructively dismissed. *f*

The applicant company argued that the Industrial Court was wrong for applying the "unreasonable test" instead of the "contract test" in determining constructive dismissal. It was alleged that the "unreasonable test" was applied as phrases such as "justifiable to request" and "judged reasonably and sensibly" were used in the award. Further, the applicant company argued that it did not commit any fundamental breach of contract in the redesignation, as it was its prerogative to decide over the matter and that loss of pride did not constitute constructive dismissal. *g* *h*

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Held:

[1] The Industrial Court's finding on the demotion was based on the contract test. The evidence before the Industrial Court justified that finding. The failure on the part of the Industrial Court to make a specific finding that the applicant company had committed a breach of contract which went to the fundamental terms of the contract, was a mere technicality, which did not render the award erroneous in law.

[2] Though the applicant company might vary the respondent's job's specifications if the need arose, it could not simply change the appointment, as the appointment of the respondent as financial controller was the basis of the appointment. The redesignation from financial controller to accounting manager, which led to the depriving of the room and the Volvo 740 car, was a chain of events which resulted in the fundamental breach of the contract by the company. Since the respondent did not agree to the change, the applicant company could not vary the designation from a superior position to an inferior one. The respondent was, therefore, entitled to regard the contract as terminated and to resign.

[3] The common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer.

[3a] The proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable but whether the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract.

[3b] The finding of demotion was sufficient to warrant the respondent's claim to consider himself as dismissed as the terms of the contract had been breached. The breach was so fundamental as to go to the root of the contract.

[4] The Industrial Court was not wrong to use the phrases "justifiable to request" and "judged reasonably and sensibly" as the Industrial Court was only bound to decide on the substantial merits of the case without regard to technicalities and legal form (s. 30(5) of the Industrial Relations Act 1967).

[5] The "contract test" is preferred to that of the "unreasonable test". The Industrial Court's decision was not based on the company's unreasonable behaviour but on the basis that the company had breached the contract when the position was changed from that of financial controller to accounting manager. Thus, the Industrial Court had correctly used the "contract test".

[6] In this instance, it was not a case of loss of pride but a clear breach of contract by the company which deprived the respondent of his proprietary right to earn a living.

[Application dismissed with costs.]

Cases referred to:
Ang Beng Teik v. Pan Global Textile Bhd Penang [1996] 4 CLJ 313 ***(refd)***
Anwar bin Abdul Rahim v. Bayer (M) Sdn Bhd [1998] 2 CLJ 197 ***(refd)***
Holiday Inn, Kuching v. Elizabeth Lee Chai Siak [1992] 1 CLJ 141 ***(refd)***
Talasco Insurance Sdn Bhd v. Industrial Court of Malaysia & Anor [1997] 4 CLJ 97 ***(refd)***
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45 ***(refd)***

For the applicant company - TM Varughese; M/s TM Varughese & Co
For the respondent - M Manogaran; M/s Mano & Co

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim J:

This is an application by Campbell Cheong Chan (N) Sdn Bhd (the company) for an order of *certiorari* to quash the Industrial Court award No. 310 of 1998 which held that the respondent was constructively dismissed and the dismissal was without just cause or excuse, and awarded sixteen months backwages (RM178,480) and compensation of three months salary (RM33,465) *in lieu* of reinstatement.

The respondent commenced work as financial controller with Cheong Chan (Hup Kee) Sdn. Bhd. on 4 July 1994. Cheong Chan (Hup Kee) Sdn. Bhd. entered into a joint venture agreement with Campbell Soup Company of the USA and on 1 December 1995, the company, Campbell Cheong Chan (M) Sdn. Bhd. came into being. The company then *vide* a letter of appointment dated 1 December 1995 appointed the respondent to the same position as financial controller at a salary of RM10,500 per month. This appointment letter (AN-1) provides that the respondent's terms and conditions with Cheong Chan shall remain unchanged. Para. 2 in the said letter states:

Your job duties remain unchanged and as was the case with Cheong Chan previously, the present management may vary your job specifications if the need arises.

On 1 February 1996, the respondent's salary was increased to RM11,155 per month as recognition for his valuable contribution over the past year.

On 28 June 1996, the company issued a letter (AN-4) to the respondent to tell him that his position has been redesignated from financial controller to accounting manager, to vacate his room and he will be placed in the general office area and that the Volvo 740 which the respondent was using is to be replaced with a 2.0 liter car. The letter reads:

Campbell Cheong Chan (M) Sdn. Bhd.

...
28 June 1996

Ayyawoo s/o Nadaeson
14 (Lot 2487)
Happy Garden Tambahan
Kuala Lumpur

Dear Mr. Ayyawoo

1.0 Since the start up of our joint venture and the formation of this new company, we have been re-organising the business structure as required by the new corporate direction and needs.

2.0 Effective immediately, your position had been re-designated to Accounting Manager reporting to Mr. Somasundaram the Finance Controller/Director. Your duties and responsibilities include:

a. Petty cash management;

b. Reconciliation of Balance Sheet Accounts;

c. Preparing sales tax returns and confirming amounts payable;

d. Reviewing of accounting system operating in the branches;

e. Physical verification of stock;

f. Rendering services to the associated companies; and

g. Any other duties that may be assigned by your superior from time to time.

3.0 Your basic salary remains unchanged.

4.0 Due to space constraint in the office, it is the management policy that the 4 rooms in the administration office are assigned to directors only. As such, you will be required to vacate the room by 2nd July 1996 and a desk will be allocated to you in the general office area.

5.0 In accordance to the terms and conditions of your employment and to be consistent with the terms of employment, the Company will provide you with a two (2) litre car in replacement of the Volvo 740 that you are currently using effective 2 July 1996.

6.0 All other terms and conditions of your employment not mentioned herein shall remain unchanged.

Yours sincerely,

(Sd)
Michael Wong
Managing Director

The respondent did not agree with the new arrangement and wrote a reply on 1 July 1996 requesting that he be put back in his previous position with no changes with immediate effect. The company did not reply to the respondent's letter. The respondent wrote another letter dated 3 July 1996 which is reproduced as follows:

Campbell Cheong Chan (M) Sdn. Bhd.
36, Jalan Penchala,
446700 Petaling Jaya,
Selangor Darul Ehsan.

Attention: Mr. Michael Wong

Dear Sir,

I refer to your letter dated 28 June 1996 and my reply to you dated 1 July 1996. As you have not replied my letter and reinstated me to my original position as per the terms of employment dated 1st December 1995 and 4th July 1994, I take it that you have unilaterally varied the terms of employment. I also repeat that I do not agree to the new terms set out in your letter dated 28th June 1996.

I would also like to state that besides not agreeing to the terms of your letter dated 28 June 1996, I find that paragraph 2.0 is vague and does not appear to be responsibilities of a Financial Controller. I also consider the redesignation from Financial Controller to Accounting Manager entirely wrong and not acceptable.

In reference to paragraph 4.0 of your letter I find that the act of removing me in the general office area, I believe, it is clearly to humiliate me. I find this is totally unacceptable as this does not reflect a Financial Controller's position.

a It is also strange that you have in paragraph 5.0 chosen to be consistent with the terms of employment whereas elsewhere in the letter you have acted contrary to the terms.

I find the redesignation, the relocation from my office to the general office and others mentioned in your letter is clearly against the terms of employment b and further will put me in a very embarrasing position. As such I am forced to tender my resignation with immediate effect. Further your letter dated 28th June 1996 is in breach of the terms of employment.

Yours faithfully,
(Sd)
c Ayyawoo s/o Nadeson

c.c. Human Resource Manager

After evaluating both sides of the case, the learned chairman at the end of the award at p. 99 of record, made the following findings:

d It is the finding of this Court that the change of position from Financial Controller to Accounting Manager is a change from superior position to an inferior position which resulted in the Claimant (Respondent) giving up his room and the Volvo car was a demotion. The Claimant (Respondent) was therefore entitled to plead constructive dismissal and the dismissal was without e just cause or excuse.

As to the remedy prayed for this Court is of the view that it is not in the interest of the parties to order reinstatement. There is evidence the Claimant (Respondent) and COW-4 could not get on well. The Court orders that the Claimant (Respondent) be paid compensation for loss of employment.

f Mr. T.M. Varughese for the company argued that the Industrial Court was wrong for applying the "unreasonable test" instead of the "contract test" in determining whether there was constructive dismissal in the case. In making the award, the Industrial Court failed to make specific finding on whether or not the company had committed a fundamental breach of the contract. Thus, g counsel submitted that failure to apply the correct test and to make the specific finding renders the award erroneous which may be quashed by *certiorari*.

Mr. M. Manogaran, for the respondent, in opposing the application, contended that the Industrial Court had applied the correct contract test when it made h the finding that the respondent was demoted from financial controller to accounting manager. This was evidenced by the company's letter (AN-4 at p. 40 of encl. 3) which changed the respondent's position, thereby breaching the respondent's earlier contract of employment *vide* letter (AN-l at p. 44 of encl. 3) which appointed him as the financial controller.

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Having taken into consideration that have been said by both counsel, it is my judgment that there is much merit in Mr. M. Manogaran's contention.

The Industrial Court's finding on the demotion was based on the contract test. The evidence before the Industrial Court justified that finding. In the present case, the respondent immediately on 1 July 1996 protested to the company of the change and asked the company to put himself back to his previous position with immediate effect. When there was no response from the company, he issued another letter on 3 July 1996 (at p. 46 of encl. 3) to consider himself dismissed. Thus, the immediate action taken by the respondent protesting the change is consistent with the criterion that is required under the contract test. Further, the respondent had pleaded fundamental breach in his statement of case (para. 8 at p. 33 of encl. 3). There was also submission by the company's counsel on "contract test" before the Industrial Court (p. 10 of award). Therefore, the failure on the part of the Industrial Court to make a specific finding that the company had committed a breach of contract which goes to the fundamental terms of the contract, to my mind, is a mere technicality, which does not render the award erroneous in law. The evidence before the Industrial Court clearly shows that the company has breached the terms of employment. The demotion from financial controller to accounting manager was indeed a breach of the contract which resulted the respondent losing the Volvo 740 car and the room. It is a fact that the company *vide* letter AN-l, offered the respondent the post of financial controller whereby the respondent accepted the offer and continued his duties until 28 June 1996 when AN-4 was issued. Obviously this letter is in breach of the terms of employment. It is clear from AN-4 that the company has shown that it no longer had any intention to be bound by AN-l. Though the company may vary the respondent's job specifications if the need arises as provided for under AN-1, the company cannot simply change the appointment, as the appointment of the respondent as financial controller in the company is the basis of the appointment. Moreover, the job functions mentioned in AN-1 hardly reflect those of a financial controller. Even the company's own witness, COW4, who became the finance controller/director as a result of this change, had admitted in his testimony that in the accounting field the positions of financial controller and accounting manager are not the same and that the accounting manager is subordinate to financial controller (p. 25 of Encl. 4). Thus, the redesignation from financial controller to accounting manager, which led to the depriving of the room and Volvo 740 car, is a chain of events which resulted in the fundamental breach of the contract by the company. Since the respondent did not agree to the change, the company could not vary the designation from a superior position to an inferior one. Accordingly therefore, the respondent was entitled to regard the contract as terminated and to resign.

In *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ 45; [1988] 1 MLJ 92, the Federal Court held:

> ... the common law has always recognised the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer ...

This "contract test" has been consistently followed by our courts (see the High Court case in *Holiday Inn, Kuching v. Elizabeth Lee Chai Siak* [1992] 1 CLJ 141 and the Court of Appeal case in *Anwar bin Abdul Rahim v. Bayer (M) Sdn. Bhd.* [1998] 2 MLJ 599). YA Mahadev Shanker JCA (delivering judgment of the court) in *Anwar's* case, at p. 605 said:

> It has been repeatedly held by our courts that the proper approach in deciding whether constructive dismissal has taken place is not to ask oneself whether the employer's conduct was unfair or unreasonable (the unreasonable test) but whether 'the conduct of the employer was such that the employer was guilty of a breach going to the root of the contract or whether he has evinced an intention no longer to be bound by the contract.

Thus, the finding of demotion is sufficient to warrant the respondent's claim to consider himself dismissed as the terms of the contract in AN-l have been breached by AN-4. The breach was so fundamental as to go to the root of the contract.

The company's counsel complained that the learned Chairman had applied "unreasonable test" when he used the phrases such as "justifiable to request" and "judged reasonably and sensibly" at pp. 12 and 13 of the award. And according to counsel, it is a wrong test. On perusal, I find there is no basis for the complaint. The learned Chairman used the words only to describe the conduct of the company in respect of the car and the room, and not on the demotion. It is to be noted that after AN-4 was issued, the Volvo 740 car was given to the sales manager. As such, there is nothing wrong for the Industrial Court to use the said phrases as the Industrial Court is only bound to decide on the substantial merits of the case without regard to technicalities and legal form (s. 30(5) of the Industrial Relations Act 1967). With respect, I agree with the respondent's counsel that the company had wrongly deduced that the Industrial Court by mere usage of such phrases, had applied the "unreasonable test". The principle of "unreasonable test" was applied by the Court of Appeal in *Ang Beng Teik v. Pan Global Textile Bhd. Penang* [1996] 4 CLJ 313; [1996] 3 MLJ 137.

I understand *Ang Beng Teik* is on appeal before the Federal Court. In the light of the present authorities and until *Ang Beng Teik* is affirmed by the Federal Court, I would prefer to follow *Wong Chee Hong's* "contract test".

The Industrial Court's decision is not based on the company's unreasonable behaviour but on the basis that the company had breached the contract when the position was changed from that of financial controller to accounting manager. Thus, the Industrial Court has correctly used the "contract test" when it said, "the change of position from financial controller to accounting manager is a change from a superior position to an inferior position which resulted in the claimant giving up his room and the Volvo car was a demotion ..."

It is the company's argument that the company did not commit any fundamental breach of contract in the redesignation, as it was the company's prerogative to decide over the matter and loss of pride does not constitute constructive dismissal. Counsel quoted the High Court case of *Talasco Insurance Sdn. Bhd. v. Industrial Court of Malaysia & Anor.* [1997] 4 CLJ 97 in support of his argument.

In that case, as a result of reorganisation, the claimant's designation was changed from chief accountant to accountant and required to report to a newly recruited senior manager, finance and administration instead of previously reporting to the general manager. He was also asked to move into a smaller room. The Industrial Court ruled that the claimant was constructively dismissed without just cause or excuse and ordered compensation. YA. Abdul Kadir Sulaiman J, quashed the award and ruled that the conduct of the company in carrying out the reorganisation exercise had not in any way deprived the employee of his proprietary right to earn a living and loss of pride alone would not constitute a dismissal of the employee.

In my view, the facts in *Talasco* are not similar and therefore inapplicable to the instant case. In our case, the respondent was moved to the general office area and not to a smaller room. The chief accountant in *Talasco* left the job immediately when a new senior officer was appointed whom the claimant disagreed. In the present case, the respondent continued working for more than six months from 1 December 1995 to 28 June 1996 when AN-4 was issued. COW4, who was then the finance director, was already in employment on 1 December 1995. The respondent accepted COW4. But on 28 June 1996 COW4 became the finance controller in addition to being finance director. On the facts of this case, I agree with the learned chairman's decision that the respondent was entitled to plead constructive dismissal and that the dismissal was without just cause or excuse.

Looking at the award, it is clear that the Industrial Court did not misdirect itself in law and was right in its conclusion that the change of position was a demotion. This is not a case of loss of pride but a clear breach of contract by the company which deprived the respondent of his proprietary right to earn a living. Therefore, I cannot see how the Industrial Court's award could be opened for quashing by the High Court.

In the event, I dismiss the application with costs.